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4 **UNITED STATES DISTRICT COURT**
5 **DISTRICT OF NEVADA**

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7 UNITED STATES OF AMERICA,

8 Plaintiff,

9 v.

10 GARY RUSHWAM,

11 Defendant.

Case No. 2:05-CR-432-KJD-RJJ
2:14-CV-01931-KJD

ORDER

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13 Before the Court is Defendant's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or
14 Correct Sentence by a Person in Federal Custody (#93/95). No response has been filed.

15 I. Background

16 In 2006, a jury convicted Defendant of possession of a firearm by a convicted felon
17 (#48). The Court sentenced Defendant to 188 months' imprisonment (#63/65). Defendant
18 appealed (#66), but the Ninth Circuit upheld this Court's judgment. See United States v.
19 Rushwam, 275 Fed. Appx. 684 (9th Cir. Apr. 28, 2008)(unpublished). Defendant filed a § 2255
20 motion (#78/82/83), which the Court denied (#89). Over two and a half years later, Defendant
21 filed the present motion.

22 II. Analysis

23 This is Defendant's second § 2255 motion filed with this Court. 28 U.S.C. § 2255
24 provides that:

25 (h) A second or successive motion must be certified as provided in section 2244 by a
26 panel of the appropriate court of appeals to contain—

1 (1) newly discovered evidence that, if proven and viewed in light of the evidence
2 as a whole, would be sufficient to establish by clear and convincing evidence that
3 no reasonable factfinder would have found the movant guilty of the offense; or

4 (2) a new rule of constitutional law, made retroactive to cases on collateral review
5 by the Supreme Court, that was previously unavailable.

6 The Ninth Circuit has not certified a second or successive motion. Furthermore, even if this
7 question were before the proper panel, it is unlikely that it would be certified.¹ The Court
8 consequently denies Defendant's second § 2255 Motion.

9 III. Conclusion

10 Accordingly, it is **HEREBY ORDERED** that Defendant's Motion under 28 U.S.C. §
11 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (#93/95) is
12 **DENIED**;

13 **IT IS FURTHER ORDERED** that Defendant is **DENIED** a certificate of appealability.

14 DATED this 16th day of June 2015.

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17 _____
18 Kent J. Dawson
19 United States District Judge
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25 ¹ Defendant argues that he is innocent because he was not living at the location where the guns were found.
26 Defendant also suggests that Descamps v. U.S., 133 S. Ct. 2276, 2280 (2013) created a new rule of constitutional
law. This, however, is contrary to Ninth Circuit precedent. See Ezell v. U.S., 778 F.3d 762, 763 (9th Cir. 2015)
("We hold that the Supreme Court did not announce a new rule of constitutional law in Descamps. Rather, it
clarified—as a matter of statutory interpretation—application of the ACCA in light of existing precedent.").